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BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

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AZ CORP COMMISSION
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DOCKETED BY

CARL J. KUNASEK

Chairman

JIM IRVIN

Commissioner

WILLIAM A. MUNDELL

Commissioner

In the matter of

JOSEPH MICHAEL GUESS, SR.

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Phoenix, Arizona 85032

PROGRESSIVE FINANCIAL MANAGEMENT

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IRA JOE PATTERSON

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RANDALL WAYNE SMITH, JR.

1905 Springlake Court

Birmingham, Alabama 35215

BALLY OVERSEAS TRADING INC.

1905 Springlake Court

Birmingham, Alabama 35215,

Respondents.

DOCKET NO. S-03280A-00-0000

**MOTION TO ALLOW
TELEPHONIC TESTIMONY**

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1 The Securities Division ("Division") of the Arizona Corporation Commission
2 ("Commission") hereby moves for leave to allow telephonic testimony by prospective Division
3 witnesses Lyle R. Mader ("Mader") and Dr. Boris Kozolchyk ("Dr. Kozolchyk") during the
4 hearing scheduled in the above-referenced matter.

5 I.
6 FACTS

7 The Division anticipates calling Mader as an investor witness. Mader's testimony will
8 show that he invested a total of \$75,000 in securities sold to him by Respondent Joseph Michael
9 Guess, Sr. ("Guess"), along with other testimony probative of the Division's allegations against
10 Guess in this matter. Mader resides in South Dakota and has requested that he not have to travel
11 to testify in Phoenix because of a personal economic crisis resulting in part from losses suffered
12 in his investment with Guess. His economic situation precludes him from paying for the cost of
13 his airfare to Arizona and makes impracticable the cost and loss of time involved in driving to
14 Phoenix by automobile.

15 The Division also anticipates calling Dr. Kozolchyk as an expert witness in this matter.
16 He is President and Director of the National Law Center for Inter-American Free Trade and
17 internationally recognized as an authority on commercial and banking law, as reflected in the
18 "Director's Profile" attached hereto as Exhibit A. His testimony will address the existence of the
19 bank instrument trading market alleged by the Division to be the fraudulent basis of
20 Respondents' offering of securities. Dr. Kozolchyk has previously appeared for the Division as
21 an expert witness in this regard in another case, *In the matter of the securities offering by*
22 *European Marketing Group, L.C. et al.*, S-3187-I. Because he resides and works in Tucson, Dr.
23 Kozolchyk has requested that he be allowed to testify telephonically from Tucson because of
24 personal scheduling and other time constraints.

25 II.
26 ARGUMENT

The purpose of administrative proceedings is to provide for the fair, speedy and cost

1 effective resolution of administratively justiciable matters. To effectuate that purpose, the
2 legislature provided for streamlined proceedings and relaxed application of the formal rules of
3 evidence. Specifically, A.R.S. § 41-1062(A)(1) provides for informality in the conduct of
4 contested cases. The evidence submitted in an administrative hearing need not rise to the level of
5 formality required in a judicial proceeding, as long as it is "substantial, reliable and probative."
6 In addition, the Commission promulgated rules of practice and procedure to ensure just and
7 speedy determination of all matters presented to it for consideration. *See, e.g., A.A.C. R-14-3-*
8 *101(B); R14-3-109(K).* Allowing Mader and Dr. Kozolchyk to testify by telephone retains all
9 indicia of reliability and preserves Respondents' right to cross-examination.

10 Telephonic testimony has in fact been routinely allowed in prior administrative hearings
11 before the Commission in actions brought by the Division. *See, e.g., In the matter of Forex*
12 *Investment Services Corporation et al., S-03177A-98-0000* (testimony of investor Joseph Saxon);
13 *In the matter of the Offering of Securities by Vincent James Liuzzi, III et al., S-3042-I/S-3154-I*
14 (testimony of investor Elsie Ayres).

15 Moreover, courts in other states have acknowledged that telephonic testimony in
16 administrative and civil proceedings is permissible and consistent with the requirements of
17 procedural due process. *See Babcock v. Employment Division, 72 Or. App. 486, 696 P.2d 19*
18 *(1985)* (court approved Oregon Employment Division's procedure to conduct entire hearing
19 telephonically); *W.J.C. v. County of Vilas, 124 Wis. 2d 238, 369 N.W. 2d 162 (1985)* (court
20 permitted expert testimony in commitment hearing). Both of these courts concluded that
21 fundamental fairness weighed in favor of permitting telephonic testimony.

22 Public policy also favors allowing Mader and Dr. Kozolchyk to testify telephonically.
23 The Division is able to judiciously allocate its limited resources to best serve and protect the
24 Arizona investing public by saving the costs of travel, lodging, meals and incidentals for two
25 witnesses over several days. The cost of airfare for Mader alone is substantial.

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**III.
CONCLUSION**

Allowing Mader and Dr. Kozolchik to testify telephonically at the hearing facilitates the presentation of relevant witness evidence that is expected to be substantial, reliable and probative, overcomes the hardship and expense of travel and does not compromise Respondents' due process rights. Therefore, the Division respectfully requests that leave to present the telephonic testimony of Mader and Dr. Kozolchik be granted.

RESPECTFULLY SUBMITTED this 2nd day of July, 2000.

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Consumer Protection & Advocacy Section

BY: 

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Special Assistant Attorney General
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Arizona Corporation Commission

1 ORIGINAL AND TEN (10) COPIES of the foregoing
2 filed this 21st day of July, 2000, with:

3 Docket Control
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6 Phoenix, AZ 85007

7 COPY of the foregoing mailed and/or faxed this
8 21st day of July, 2000 to:

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DIRECTOR'S PROFILE

Dr. Boris Kozolchik, President and Director of the *National Center for Inter-American Free Trade*, is a former United States delegate to the United Nations Commission on International Trade Law (UNCITRAL), and Representative of the United States Council on International Banking (USCIB) to the International Chamber of Commerce Working Group, for the Revision of the Uniform Customs and Practices for Documentary Credits. He is the former President of the International Academy of Commercial and Consumer Law. Dr. Kozolchik holds a doctorate in Civil Law from his native Cuba, and received an LL.B. from the University of Miami College of Law. He also holds an LL.M., and an S.J.D. from the University of Michigan School of Law.

Dr. Kozolchik teaches courses in commercial and international trade law at the University of Arizona College of Law in Tucson, Arizona. He is an internationally recognized scholar in commercial and international law, specializing in letter of credit, and other instruments of commerce. His writings have had world-wide impact, and he is the only U.S. scholar recognized in The national University of Mexico Hall of Fame of Professors of Commercial Law. He has also received commendations from the U. S. and several foreign governments for his commercial transactions law.